No. 91-594

In the Supreme Court of the United States

OCTOBER TERM, 1991

AMERICAN NATIONAL RED CROSS, PETITIONER

v.

S.G. AND A.E., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

KENNETH S. GELLER
Counsel of Record
ROY T. ENGLERT, JR.
JAMES G. DUNCAN
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

BRUCE M. CHADWICK
BRENDAN COLLINS
Arnold & Porter
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036

KAREN SHOOS LIPTON
General Counsel
EDWARD L. WOLF
Associate General Counsel
American National Red Cross
17th & D Streets, N.W.
Washington, D.C. 20006
Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether 36 U.S.C. § 2, which provides that the American National Red Cross has the right "to sue and be sued in courts of law and equity, State or Federal," vests federal courts with original jurisdiction over actions to which the Red Cross is a party, so that the Red Cross may remove to federal court under 28 U.S.C. § 1441(a) and (b) a tort action brought in state court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES

TABLE OF AUTHORITIES—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1991

No.

AMERICAN NATIONAL RED CROSS, PETITIONER

v.

S.G. AND A.E., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

PETITION FOR A WRIT OF CERTIORARI

The American National Red Cross respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 938 F.2d 1494. The opinions of the district court (App., *infra*, 18a-30a) are unreported.

JURISDICTION

The court of appeals entered its judgment on July 24, 1991 (App., *infra*, 17a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2 of the American National Red Cross charter, 36 U.S.C. § 2, provides, in relevant part, that the American National Red Cross "shall have * * * the power to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States."

STATEMENT

Respondents, a husband and wife, sued the Red Cross in March 1990 in the Superior Court of Merrimack County, New Hampshire. They alleged that the wife became infected with human immunodeficiency virus (HIV), which causes AIDS, as a result of a transfusion of blood collected by the Red Cross.[1] The Red Cross removed the case to federal district court under 28 U.S.C. § 1441, contending that the court had jurisdiction under 36 U.S.C. § 2. The district court agreed that federal jurisdiction existed and denied respondents' motion to remand the case to state court. The court of appeals reversed while acknowledging that its decision conflicts with a recent decision of the Eighth Circuit.

A. The Red Cross and Its Charter

This case involves the construction of a provision of the Red Cross charter, as amended in 1947, in light of *Osborn* v. *Bank of the United States*, 22 U.S.C. (9 Wheat.) 738 (1824), and subsequent cases. Construction of the 1947 amendments to the charter is

[1] Respondents simultaneously moved to consolidate this case with pending cases against the wife's surgeon and the manufacturer of an allegedly defective surgical stapler. When the Red Cross removed the case to federal court, the state court had not yet ruled on the motion to consolidate.

aided by an understanding of the background of the Red Cross.

Since 1864, several Geneva Conventions have provided for neutral persons from various nations to provide relief for the sick and wounded in times of war. See 36 U.S.C. § 1 note; 36 U.S.C. § 3; *Department of Employment* v. *United States*, 385 U.S. 355, 359 & n.8 (1966). In 1881, what is now known as the American National Red Cross was formed to serve that function. See 36 U.S.C. § 1 note. The Red Cross was reincorporated several times and was granted its first congressional charter in 1905. Congress in 1905 "believed that the importance of the work demands a repeal of the present charter and a reincorporation of the society under Government supervision." *Ibid.* Under the 1905 charter, the Red Cross was formally assigned various peacetime duties in addition to its military-related duties, including disaster relief and prevention. See 36 U.S.C. § 3; *Department of Employment*, 385 U.S. at 359; Harriman Committee Report 4-5, C.A. App. 101-102.[2]

The 1905 charter empowered the Red Cross "to sue and be sued in courts of law and equity within the jurisdiction of the United States." Act of Jan. 5, 1905, ch. 23, § 2, 33 Stat. 600. That charter unquestionably created original federal jurisdiction over all

---

[2] The Harriman Committee Report, formally entitled *Report of the Advisory Committee on Organization* (June 11, 1946), was prepared by a distinguished committee appointed by the Chairman of the Red Cross to recommend changes to the charter and by-laws of the Red Cross. See also App., *infra*, 12a. Its recommendations were the acknowledged basis of Congress's 1947 amendments to the Red Cross charter. S. Rep. No. 38, 80th Cong., 1st Sess. 1 (1947); H.R. Rep. No. 337, 80th Cong., 1st Sess. 6 (1947).

cases involving the Red Cross, because (the sue-and-be-sued clause aside) *all* federally chartered corporations at that time were automatically within the jurisdiction of the federal courts. The then-prevailing law of original federal jurisdiction was stated in the *Pacific Railroad Removal Cases*, 115 U.S. 1 (1885), which held that the fact of federal incorporation, by itself, conferred on the federal courts jurisdiction over all cases involving federally chartered corporations. This grant of federal jurisdiction over all Red Cross cases became less clear in 1925, when Congress overruled *Pacific Railroad* by passing what is now 28 U.S.C. § 1349. That statute provides that "[t]he district courts shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock."

It is unclear whether Congress intended Section 1349 to apply to the Red Cross, a non-stock corporation. What is clear is that Congress may confer federal jurisdiction over a corporation by specific charter language notwithstanding Section 1349. In *Osborn* v. *Bank of the United States*, *supra*, the Court held that a sue-and-be-sued clause making specific reference to federal courts conferred federal jurisdiction. The sue-and-be-sued clause at issue in *Osborn* gave the Bank the right "to sue and be sued * * * in all state courts having competent jurisdiction, and in any circuit court in the United States." 22 U.S. (9 Wheat.) at 817.

After the enactment of Section 1349, the Harriman Committee (see note 2, *supra*) in 1946 recommended that the Red Cross charter be amended to "make it clear that the Red Cross can sue and be

sued in the Federal Courts" because "in view of the limited nature of the *jurisdiction* of the Federal Courts it seems desirable that this *right* be clearly stated in the charter." Harriman Committee Report 35, 36, C.A. App. 132, 133 (emphasis added). Congress responded to that suggestion by simply adding the words "State or Federal" to the sue-and-be-sued clause, so that it now entitles the Red Cross "to sue and be sued in courts of law and equity, *State or Federal*, within the jurisdiction of the United States." 36 U.S.C. § 2 (emphasis added). Neither the Senate nor the House report comments on the purpose of the amendment beyond endorsing the Harriman Committee Report, but Senator Walter George remarked at a hearing: "I think the purpose of the bill is very clear, and that is to give the jurisdiction in State courts and Federal courts, and I think we had better leave it there." *American National Red Cross: Hearing on S. 591 Before the Senate Comm. on Foreign Relations*, 80th Cong., 1st Sess. 10 (1947).

The Harriman Committee Report commented on the objectives underlying the whole enterprise of charter revision that was undertaken in 1946-1947. One was "recognition of the national stature of the Red Cross and of the national interests in aid of which the Red Cross now functions." Harriman Committee Report 15, C.A. App. 112. The Report also acknowledged that the Red Cross is an "agency of the Government of the United States" for various purposes. *Id.* at 20, C.A. App. 117. This Court likewise has noted that, "time and time again, both the President and the Congress have recognized and acted in reliance upon the Red Cross' status virtually as an arm of the Government," such that, despite some acknowledged "respects in which the Red Cross differs

from the usual government agency," it is a "tax-immune instrumentalit[y] of the United States." *Department of Employment*, 385 U.S. at 359-360; see also *United States* v. *City of Spokane*, 918 F.2d 84, 87 (9th Cir. 1990) ("there can be no doubt" that "the Red Cross *is* an instrumentality of the United States"), cert. denied, 111 S. Ct. 2888 (1991).

The question presented here is whether this important instrumentality of the United States, with a charter that unquestionably provided for removal to federal court when passed in 1905 and that was subsequently amended to make specific reference to the federal courts, may remove an action to federal court when it is sued in state court in a nondiversity case.

B. Proceedings Below

The Red Cross removed this case from New Hampshire state court to the federal district court pursuant to 28 U.S.C. § 1441(a) and (b). The district court denied respondents' motion to remand, holding that the sue-and-be-sued clause in the Red Cross charter creates original federal jurisdiction and thus entitles the Red Cross to remove to federal court actions to which it is a party. App., *infra*, 23a-24a. The court relied on *Osborn* v. *Bank of the United States*, *supra*, in which this Court held that a parallel sue-and-be-sued clause that referred expressly to federal courts did confer federal jurisdiction. Although the district court recognized that "the courts are divided on this argument" (App., *infra*, 23a), it adhered to the "better-reasoned rule" finding *Osborn* applicable to the Red Cross (*id.* at 24a).

Concerned by the "conflicting decisions on the issue of jurisdiction over Red Cross" (App., *infra*, 28a),

the district court certified the issue under 28 U.S.C. § 1292(b) for an interlocutory appeal to the United States Court of Appeals for the First Circuit in an order dated June 19, 1990. App., *infra*, 26a-30a. The court of appeals accepted certification on September 13, 1990. See *id.* at 4a. It then reversed the district court's decision and ordered that the case be remanded to state court if diversity jurisdiction did not provide an independent basis for removal. *Id.* at 1a-16a.[3]

The court of appeals acknowledged that the question before it was not "easily decided" (App., *infra*, 15a) and that the Eighth Circuit, among other courts, had found original federal jurisdiction over the Red Cross in *Kaiser* v. *Memorial Blood Center*, 938 F.2d 90 (1991) (App., *infra*, 5a). The court of appeals also acknowledged that "it is easy to imagine that Congress would have conferred federal subject matter jurisdiction in cases by and against the Red Cross had the issue been presented." *Id.* at 16a. Nevertheless, apparently regarding the Red Cross charter as "ineptly drafted" (*ibid.*), the court "reach[ed] a different conclusion" (*id.* at 5a).

The court of appeals found this case closer to *Bankers Trust Co.* v. *Texas & Pacific Railway*, 241 U.S. 295 (1916), than to *Osborn*. App., *infra*, 7a-9a. In *Bankers Trust*, this Court held that a sue-and-be-sued clause that referred to "all courts of law and equity within the United States" was not a grant of jurisdiction to federal courts, but merely conferred the capacity to sue and be sued where jurisdiction

---

[3] The district court has expressed its intention to allow joinder of nondiverse parties and remand the case to state court if it ultimately is determined that 36 U.S.C. § 2 does not provide original federal jurisdiction. App., *infra*, 28a.

was otherwise established. Although there is no specific reference to the federal courts at all in that clause (as there was in *Osborn* and is in the Red Cross charter), the First Circuit read *Bankers Trust* to turn on the failure of the clause to "mention *a particular* federal court (i.e., the circuit court)." *Id.* at 8a (emphasis added); see also *id.* at 10a. The First Circuit also found in *Bankers Trust*, and in 28 U.S.C. § 1349, a general rule "that a congressional grant of such jurisdiction should not be implied from ambiguous language." App., *infra*, 9a.

The court of appeals further distinguished *Osborn* on the ground that the charter in *Osborn* gave the Bank the power to "sue and be sued * * * in all state courts *having competent jurisdiction*, and in any circuit court of the United States." 22 U.S. (9 Wheat.) at 817, *quoted in* App., *infra*, 9a (emphasis added by the First Circuit). The court reasoned that the presence of the phrase "having competent jurisdiction" in the portion of the *Osborn* charter dealing with state courts, combined with its absence from the portion of the charter dealing with federal circuit courts, justified reading the statute as one conferring jurisdiction on the federal courts. By contrast, the Red Cross charter refers to state and federal courts in a single clause without the phrase "having competent jurisdiction." The court deemed the "parallel" treatment of state and federal courts in the Red Cross charter sufficient to distinguish it from the one at issue in *Osborn*. *Id.* at 10a.

The court of appeals finally dismissed the legislative history of the Red Cross charter on the ground that it showed no "clear intent on the part of Congress to confer original jurisdiction." App., *infra*, 12a. The court acknowledged the reference to "juris-

diction" in the Harriman Committee Report but refused to accord it weight because the word is not used in the formal recommendation, the statutory amendment, or the Senate Report. *Id.* at 12a-14a. The court also noted that Congress could have made its intention to confer jurisdiction clearer and had in fact done so in other contemporaneous statutes. *Id.* at 14a-15a.

REASONS FOR GRANTING THE PETITION

As the First Circuit acknowledged (App., *infra*, 5a), its decision in this case conflicts with *Kaiser* v. *Memorial Blood Center*, 938 F.2d 90 (8th Cir. 1991). At the district court level, conflicting decisions are proliferating rapidly in virtually all circuits, and the need for guidance from this Court is acute. This case is a timely and rare opportunity to provide that guidance, since there are systemic reasons why few of the district court decisions receive appellate review. Moreover, the decision below is erroneous, and the issue that it addresses is important.

I. THE COURT OF APPEALS' INTERPRETATION OF 36 U.S.C. § 2 CONFLICTS WITH THE EIGHTH CIRCUIT'S INTERPRETATION AND AGGRAVATES THE EXISTING SPLIT OF AUTHORITY IN THE DISTRICT COURTS

In *Kaiser*, the Eighth Circuit faced the same issue as the First Circuit did in this case. The Eighth Circuit held that the "specific reference to the federal courts" in the Red Cross charter is comparable to the charter language in *Osborn* and thus confers federal jurisdiction, making removal appropriate. 938 F.2d at 93. The First Circuit expressly rejected the Eighth Circuit's holding. App., *infra*, 5a.

The circuit split promises to fuel the disarray resulting from the district courts' attempts to grapple with this issue. More than 40 district court decisions have interpreted the Red Cross charter, roughly half concluding that it creates federal jurisdiction [4]

---

[4] *Reisner* v. *Regents of the University of California*, No. CV-91-1252-JMI (JRx) (C.D. Cal. Aug. 22, 1991) (Ideman, J.); *Nacion* v. *West Hollywood Hospital*, No. 91-2411-MRP (GHK) (C.D. Cal. Aug. 19, 1991) (Pfaelzer, J.) (petition for interlocutory appeal filed Sept. 9, 1991); *Gillum* v. *Addis*, No. 91-293-TUC-RMB (D. Ariz. July 10, 1991); *Raybould* v. *American Red Cross*, No. H-91-754 (S.D. Tex. May 29, 1991); *C.G.W.* v. *Arcelona*, No. 91-662-C (E.D. Mo. May 23, 1991) (Cahill, J.); *Doe* v. *Alpha Therapeutic Corp.*, 763 F. Supp. 1039 (E.D. Mo. 1991) (Gunn, J.), permission to appeal denied, No. 91-8086EMSL (8th Cir. June 21, 1991); *Doe* v. *American Red Cross*, 763 F. Supp. 1084 (D. Or. 1991); *Doe* v. *Kerwood*, No. 91-CA-220 (W.D. Tex. Apr. 29, 1991), interlocutory appeal accepted, No. 91-9101 (5th Cir. July 19, 1991); *Andrea Y* v. *American Red Cross*, No. 90-6399-MRP (TX) (C.D. Cal. Feb. 25, 1991) (Pfaelzer, J.); *Brown* v. *Gartland*, No. 89-5496 (E.D. Pa. Feb. 16, 1990) (McGlynn, J.); *Doe* v. *American Red Cross*, No. 89-6281 (MRP), bench ruling (C.D. Cal. Dec. 18, 1989) (Pfaelzer, J.); *Rivera Gonzalez* v. *Commonwealth of Puerto Rico*, 726 F. Supp. 10 (D.P.R. 1989); *Sullivan* v. *Albany Medical Center Hospital*, No. 88-CV-1396, bench ruling (N.D.N.Y. June 26, 1989); *Irigoyen* v. *Kaiser Foundation Health Plan*, No. CV89-134 WMB (C.D. Cal. Feb. 13, 1989) (Byrne, J.); *Kaiser* v. *Memorial Blood Center*, 724 F. Supp. 1255 (D. Minn. 1989), aff'd, 938 F.2d 90 (8th Cir. 1991); *Anonymous Blood Recipient* v. *Sinai Hospital*, 692 F. Supp. 730 (E.D. Mich. 1988) (Gilmore, J.); *Conway* v. *St. Louis Children's Hospital*, 1988 WL 168580 (E.D. Mo. July 1, 1988) (Nangle, J.); *Evan* v. *Jewish Hospital*, 1988 WL 105639 (E.D. Mo. Mar. 28, 1988) (Filippine, J.); *C.H.* v. *American Red Cross*, 684 F. Supp. 1018 (E.D. Mo. 1987) (Harper, J.); *Smith* v. *Curators of the Univ. of Missouri*, 1987 WL 61205 (E.D. Mo. Apr. 2, 1987) (Harper, J.).

and half concluding that it does not.[5] This division of authority exists not only between different judicial districts, but sometimes within a single judicial dis-

---

[5] *Doe* v. *Baystate Medical Center*, No. CA90-10094-Y (D. Mass. Sept. 4, 1991) (Young, J.); *Murphy* v. *St. Vincent Hospital*, No. CA90-12595-Y (D. Mass. Sept. 4, 1991) (Young, J.); *Hernandez* v. *County of Los Angeles*, No. 91-3182-SVW(EX) (C.D. Cal. Aug. 27, 1991) (Wilson, J.); *Doe* v. *American Red Cross*, No. 91-3114 (E.D. Pa. Aug. 23, 1991) (Ludwig, J.); *Doe* v. *Vanderbilt University*, No. 3-91-0244 (M.D. Tenn. July 23, 1991); *Goldstein* v. *American Red Cross*, No. 90-CV-60327-AA (E.D. Mich. July 11, 1991) (La Plata, J.); *Luckett* v. *Harris Hospital*, 764 F. Supp. 436 (N.D. Tex. 1991); *McEvilly* v. *Rush Presbyterian St. Luke's Medical Center*, 765 F. Supp. 434 (N.D. Ill. 1991); *Boutar* v. *American National Red Cross*, 1991 U.S. Dist. LEXIS 4590 (D.D.C. Apr. 9, 1991) (Greene, J.); *Ray* v. *American National Red Cross*, 1991 U.S. Dist. LEXIS 3963 (D.D.C. Mar. 25, 1991) (Penn, J.); *McCool* v. *American Red Cross*, 1991 U.S. Dist. LEXIS 2818 (E.D. Pa. Mar. 6, 1991) (J. Kelly, J.); *Carr* v. *American Red Cross*, 1990 U.S. Dist. LEXIS 14728 (E.D. Pa. Nov. 1, 1990) (Waldman, J.); *Stuart* v. *West Jersey Hospital*, No. 90-3744 (SSB) (D.N.J. Sept. 28, 1990); *Coccia* v. *American Red Cross*, 1990 U.S. Dist. LEXIS 13022 (E.D. Pa. Sept. 28, 1990) (Pollak, J.); *Jozdani* v. *American Red Cross*, No. CV 90-2321-WDK (Sx) (C.D. Cal. May 14, 1990) (Keller, J.), permission to appeal denied, No. 90-80232 (9th Cir. Sept. 6, 1990); *Torres* v. *Ortega*, No. C 8626 (N.D. Ill. Feb. 16, 1990); *Doe* v. *American Red Cross*, No. 89 6282 (TJH) (C.D. Cal. Jan. 11, 1990) (Hatter, J.); *Doe* v. *American Red Cross*, No. CV 89-6284 RG (C.D. Cal. Jan. 10, 1990) (Gadbois, J.); *Doe* v. *American Red Cross*, 727 F. Supp. 186 (E.D. Pa. 1989) (Pollak, J.); *Zaccone* v. *American Red Cross*, No. C88-4458 (N.D. Ohio Dec. 15, 1989); *Collins* v. *American Red Cross*, 724 F. Supp. 353 (E.D. Pa. 1989) (Waldman, J.); *Leahy* v. *County of Los Angeles*, No. 89-5344 WDK (Gx) (C.D. Cal. Oct. 13, 1989) (Keller, J.); *Anonymous Blood Recipient* v. *William Beaumont Hospital*, 721 F. Supp. 139 (E.D. Mich. 1989) (Feikens, J.); *Osborne* v. *Hawkes Hospital of Mount Carmel*, No. C-2-89-440 (S.D. Ohio Aug. 25, 1989) (Smith,

trict itself. Whether a case is litigated in state or federal court thus depends not only on the state in which it is brought, but also on the fortuity of which judge within a federal district receives the case once it is removed.[6]

There is no realistic prospect for resolution of this far-reaching conflict without a decision by this Court. Any appellate decision hereafter will simply side with the Eighth Circuit or side with the First Circuit and, at best, shift the weight of authority in one direction or the other from its current rough equipoise. Moreover, the question rarely reaches the appellate level, as the current disproportion between appellate decisions (two) and trial-level decisions (more than 40) attests.

District court decisions to remand a case to state court are, ordinarily, "not reviewable on appeal or otherwise" (28 U.S.C. § 1447(d)), and the standards

---

J.); *Vansant* v. *American Red Cross*, No. 88-8275 (E.D. Pa. June 30, 1989) (O'Neill, J.); *Smith* v. *Thomas Jefferson Univ. Hospital*, 1989 WL 73776 (E.D. Pa. Aug. 7, 1989) (Fullam, C.J.); *Okoro* v. *Children's Hospital*, 1988 WL 168531 (D.D.C. July 12, 1988) (Greene, J.); *Griffith* v. *Columbus Area Chapter of the American Red Cross*, 678 F. Supp. 182 (S.D. Ohio 1988) (Graham, J.); *Roche* v. *American Red Cross*, 680 F. Supp. 449 (D. Mass. 1988) (Keeton, J.); *Jeanne* v. *Hawkes Hospital of Mount Carmel*, 1988 WL 168542 (S.D. Ohio Jan. 29, 1988) (Graham, J.); *Walton* v. *Howard University*, 683 F. Supp. 826 (D.D.C. 1987) (Penn, J.).

[6] In the Central District of California, for example, Judges Byrne, Pfaelzer, and Ideman have held that the Red Cross charter confers federal jurisdiction, but Judges Hatter, Gadbois, Keller, and Wilson have held that it does not. In the Eastern District of Michigan, Judge Gilmore has found jurisdiction; Judges Feikens and La Plata have found none. See notes 4 & 5, *supra*.

for certification of interlocutory appeals under 28 U.S.C. § 1292(b) are exacting. See App., *infra*, 27a. Those factors combine to make appellate decisions of this issue a rarity. The First and Eighth Circuits, as noted, have decided the issue, and the Fifth Circuit has recently accepted the issue on interlocutory appeal in *Doe* v. *Kerwood*, No. 91-9101 (July 19, 1991). The D.C. Circuit, on the other hand, has rejected a district court's effort to certify the issue without first deciding it (*Ray* v. *American National Red Cross*, 921 F.2d 324 (1990) (per curiam)), and the Ninth Circuit, citing 28 U.S.C. § 1447(d), has rejected a district court's effort to certify the issue after deciding that the case should be remanded (*Jozdani* v. *American Red Cross*, No. 90-80232 (Sept. 6, 1990) (unpublished order)).

As a result of the difficulty of securing appellate review, trial courts will only rarely obtain guidance from the federal courts of appeals on this issue, and the opportunities for *this* Court to review the issue will be few. This case presents such an opportunity, and the Court should take it.

The decision below also creates conflicts that extend beyond Red Cross cases. The theory of the decision below is that a congressional charter that grants an instrumentality of the United States the right to sue and be sued in the federal courts, but "makes no reference to the jurisdiction of specific courts, either state or federal" (App., *infra*, 10a), does not create original federal jurisdiction. The Red Cross is not the only instrumentality of the United States whose sue-and-be-sued clause meets that description. For example, 12 U.S.C. § 1702 provides that the Secretary of Housing and Urban Development may "sue and be sued in any court of com-

petent jurisdiction, State or Federal." The First Circuit necessarily would construe that clause as a mere grant of capacity to the Secretary, not a grant of jurisdiction to the federal courts. Yet the Fourth Circuit has held that "section 1702 * * * confer[s] subject matter jurisdiction in the federal district court." *Portsmouth Redevelopment & Housing Authority* v. *Pierce*, 706 F.2d 471, 475, cert. denied, 464 U.S. 960 (1983). Agreeing with that conclusion, the Solicitor General has advised this Court: "Plainly, Section 1702, by authorizing suit 'in any court of competent jurisdiction, State or Federal,' provides a basis for district court jurisdiction * * *." Brief for the Respondents in Opposition at 9, *Portsmouth Redevelopment and Housing Authority* v. *Pierce*, No. 83-90. The decision below therefore contradicts not only the Eighth Circuit's holding with respect to the Red Cross charter, but also the view of both the Fourth Circuit and the federal government. The Court should grant certiorari to review these important conflicts.

II. THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS

This Court's decisions teach how a sue-and-be-sued clause in a federal charter is to be interpreted: a specific reference to the federal courts is construed as a grant of jurisdiction. The First Circuit embraced a more complicated analysis that requires "mention [of] *a particular* federal court" (App., *infra*, 8a (emphasis added)) in order to find jurisdiction, but that analysis finds no support in this Court's decisions. Moreover, the First Circuit erroneously disregarded the evidence of Congress's intent to provide jurisdiction in *this* charter.

A. This Court has ruled consistently that an express reference to the federal courts in a federal cor-

poration's sue-and-be-sued clause creates federal jurisdiction over actions involving that corporation. The seminal and still controlling case is *Osborn* v. *Bank of the United States*, *supra*. In that case, the Bank's charter allowed it "to sue and be sued * * * in all State Courts having competent jurisdiction, *and in any circuit court of the United States*." 22 U.S. (9 Wheat.) at 817 (emphasis added). This Court held that the provision "admit[ted] of but one interpretation" (*ibid.*), namely that the charter "confers jurisdiction on the circuit court of the United States, if Congress can confer it" (*id.* at 818). In reaching that decision, the Court distinguished an earlier case involving the Bank's predecessor, *Bank of the United States* v. *Deveaux*, 9 U.S. (5 Cranch) 61 (1809), on the ground that the charter in *Deveaux* referred only to "courts of record" (*id.* at 85) and did not specify the federal courts. The words that Chief Justice Marshall chose to distinguish between *Deveaux* and *Osborn* are important, for they reflect that it was the reference to *the federal courts* generally, not the reference to *a specific federal court*, that influenced the Court's decision:

> Whether this decision [*Deveaux*] be right or wrong, it amounts only to a declaration, that a general capacity in the bank to sue, *without mentioning the courts of the Union*, may not give a right to sue in those courts. To infer from this, that words expressly conferring a right to sue in *those courts*, do not give the right, is surely a conclusion which the premises do not warrant.

22 U.S. (9 Wheat.) at 818 (emphasis added). Thus, *Osborn* established the principle that reference to the federal courts in a sue-and-be-sued clause creates federal jurisdiction.

In the *Pacific Railroad Removal Cases*, *supra*, this Court went well beyond *Osborn* by holding that the mere fact of federal incorporation creates federal jurisdiction over cases involving the corporation. Congress reacted by withdrawing federal jurisdiction based solely on a railroad's federal incorporation (Act of Jan. 28, 1915, ch. 22, § 5, 38 Stat. 803), and in 1925 extended that withdrawal to all federally chartered stock corporations (see 28 U.S.C. § 1349). The court below erred, however, in concluding (App., *infra*, 6a-7a) that Congress's nullification of *Pacific Railroad* undermined the holding of *Osborn*. To the contrary, Congress in no way limited *Osborn*'s vitality. The relevant holding in *Osborn* is grounded strictly in the charter language that referred to the federal courts, not in the fact that the Bank was federally chartered.

Subsequent case law confirms the validity of distinguishing between jurisdiction based on charter language and jurisdiction based on the fact of federal incorporation. In *Bankers Trust Co.* v. *Texas & Pacific Railway*, this Court again construed charter language that empowered a railroad to sue and be sued "in all courts of law and equity *within the United States*" but did not specify the federal courts. 241 U.S. at 302 (emphasis added). Because the language suffered from "the same generality" as the language in *Deveaux*, this Court held that the charter did not create federal jurisdiction. *Id.* at 304-305. The case does not, as the court of appeals suggested (App., *infra*, 8a-9a), rest on any general rule that ambiguous statutes will be construed not to grant jurisdiction or that mention of a *specific* federal court is required. It simply interprets a statute that

is wholly unlike the Red Cross charter and instead like the statute construed in *Deveaux*.

On the only occasion when this Court *has* confronted a sue-and-be-sued clause that refers specifically to the federal courts but not to any particular federal court, it has found the clause to be a grant of jurisdiction. In *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447, 455 (1942), the Court wrote:

> The jurisdiction of the District Court in this case, however, is not based on diversity of citizenship. Respondent, a federal corporation, brings this suit under an Act of Congress authorizing it to sue or be sued "in any court of law or equity, State or Federal."

In an accompanying footnote, the Court noted that the quoted Act "further provides" that actions in which the FDIC is a party shall be deemed to arise under federal law, yet the Court made no comment on the significance of that fact. *Id.* at 455 n.2. The fact that the Court regarded as having jurisdictional importance was the one quoted in the text, *i.e.*, that the statute—exactly like the Red Cross charter—authorized suit "in any court of law or equity, State or Federal."

Justice Jackson, concurring, stated even more explicitly that the "arising under" language found in the majority's footnote had a substantive purpose (*i.e.*, directing the courts to fashion a federal common law) and that jurisdiction itself was conferred by the statute's reference to the federal courts:

> This case is not entertained by the federal courts because of diversity of citizenship. It is here because a federal agency brings the action, and the law of its being provides, with exceptions

> not important here, that: "All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States: . . ." *That this provision is not merely jurisdictional is suggested by the presence in the same section of the Act of the separate provision that the Corporation may sue and be sued "in any court of law or equity, State or Federal."*

315 U.S. at 467-468 (emphasis added and footnote omitted). The court below, by attempting to distinguish *D'Oench* on the theory that the "arise under" clause, not the sue-and-be-sued clause, was the jurisdiction-conferring feature of the statute (App., *infra*, 10a-11a), thus was not faithful to this Court's reasoning.

The court of appeals ignored the clear import of these precedents in ruling that 36 U.S.C. § 2 does not create federal jurisdiction. Indeed, the court dismissed the Red Cross charter's specific reference to federal courts—Congress's chosen method of conferring federal jurisdiction on corporations—as having no "talismanic significance." App., *infra*, 7a. Regardless of how the significance of the reference is characterized, *Osborn*'s holding that such a reference constitutes an express grant of federal jurisdiction is surely controlling. Unlike the First Circuit, the Eighth Circuit recognized *Osborn*'s authority and held that a reference to federal courts confers federal jurisdiction. *Kaiser* v. *Memorial Blood Center*, *supra*.

B. Resort to legislative history in this case should be unnecessary because of the clear reference to the federal courts in the Red Cross charter, which brings it within the rule of *Osborn* and *D'Oench*. Nevertheless, the legislative history strongly supports the Red Cross's position. The court of appeals sought to cir-

cumvent the legislative history (App., *infra*, 12a-15a), but its effort to do so—particularly its reliance on a comparison to other statutes—is unconvincing.

The Red Cross charter amendments were passed just five years after *D'Oench* and contained language almost identical to that which this Court found to be jurisdiction-conferring in the FDIC charter. One must, of course, presume that Congress intended those words to have the meaning that this Court had given them in similar legislation. *Cannon* v. *University of Chicago*, 441 U.S. 677, 695-698 (1979); see also *Bowen* v. *Massachusetts*, 487 U.S. 879, 896 (1988). But it is not necessary to rely on a presumption alone, for both the Harriman Committee Report, and one of the few Members of Congress who ever commented on this legislation, *expressly* stated its purpose to be jurisdictional. See pp. 4-5, *supra*. Furthermore, the "national stature" and governmental nature of the Red Cross were driving forces behind the 1947 charter amendments (*id.* at 5), and those policies support a construction of the charter that allows the Red Cross to remove lawsuits from state to federal court.

The court of appeals dismissed these explicit references to "jurisdiction" on the curious ground that they were not repeated elsewhere. App., *infra*, 12a-14a. The court found it significant, for example, that "the Senate Report makes no mention of the jurisdictional point whatsoever." *Id.* at 14a. But the Senate Report is just two pages long (less than *one* full page of text) and says virtually nothing more than that the legislation incorporates the uncontroversial recommendations of the Harriman Committee Report. S. Rep. No. 38, 80th Cong., 1st Sess. (1947). In relying on a tenuous negative inference from that document and similar sources, the First Circuit was

grasping at straws. See *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592 (1980) ("In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.").

The court below relied more heavily on the theory that Congress *could have* used more specific language to grant jurisdiction, and did so in a couple of statutes passed shortly after the amendment of the Red Cross charter. App., *infra*, 14a-15a. The negative inference from Congress's failure to use more specific language fails, however, because the language Congress chose lends itself even more poorly to the interpretation the court of appeals attributed to it. Congress could have used clearer language had it intended to achieve that result and did so in at least one contemporaneous statute.

The court of appeals was forced to conclude that the 1947 amendments to the Red Cross charter had the effect of "conferring only the power to sue." App., *infra*, 12a. But adding the words "State or Federal" to the 1905 charter was clearly unnecessary to achieve that end. The charter already empowered the Red Cross "to sue and be sued in courts of law and equity within the jurisdiction of the United States." Federal courts surely had been courts of law within the jurisdiction of the United States between 1905 and 1947. There was thus no need to single them out for this limited purpose when the charter was amended.

Furthermore, if Congress intended only to make clear the Red Cross's *capacity* to sue in state and federal courts, it could just as easily have given the Red Cross merely the power "to sue and be sued, to

complain and to defend in any court of competent jurisdiction," without explicit reference to the federal courts; and that is precisely what Congress did in reincorporating the Export-Import Bank of the United States on June 9, 1947, just a month after it amended the Red Cross charter. Act of June 9, 1947, ch. 101, § 1, 61 Stat. 130 (current version at 12 U.S.C. § 635(a)(1)). In short, Congress could have been clearer in achieving the result that the court of appeals postulated, just as it could have been clearer in conferring jurisdiction. The question presented must be answered by analyzing the language that Congress *did* use in the light of governing precedents, not by drawing negative inferences from the language that Congress *could have* used.

The court of appeals, moreover, misquoted in a significant way the statute that it regarded as the best evidence that the 1947 Congress did not intend a statute worded like 36 U.S.C. § 2 to grant jurisdiction. In August 1947, Congress passed a statute clearly conferring on federal district courts jurisdiction over cases in which the Federal Crop Insurance Corporation sues or is sued, and the court of appeals asserted that "Congress so amended the F.C.I.C. charter despite the presence of the language 'sue and be sued in any court, state or federal' in the corporation's original charter." App., *infra*, 14a.[7] The ac-

[7] The court of appeals relied further on language in the charter of the Commodity Credit Corporation, also enacted *after* the amendments to the Red Cross charter, that conferred *exclusive* original jurisdiction on the federal courts. App., *infra*, 14a-15a (citing Act of June 29, 1948, ch. 704, § 4, 62 Stat. 1070). The court failed to appreciate that Congress naturally would use different language to create exclusive rather than concurrent jurisdiction.

tual language in the original FCIC charter, however, was quite different: "The Corporation * * * may sue and be sued in its corporate name in any court *of competent jurisdiction*, State or Federal." Act of Feb. 16, 1938, ch. 30, § 506, 52 Stat. 73 (emphasis added). The "of competent jurisdiction" language—which is absent from the Red Cross charter—introduces a potential ambiguity that Congress may have wished to eliminate, since the earlier version might be read to presuppose that jurisdiction is determined by some body of law other than the sue-and-be-sued clause itself.[8] Since no such ambiguity has ever appeared in the Red Cross charter, the 1947 amendment of the FCIC charter cannot form the basis for any inference about the meaning of the 1947 amendment of the Red Cross charter, and the court of appeals erred by drawing such an inference.

The inference that the court of appeals would draw is wrong for the additional reason that it inverts the proper time sequence that should guide the interpretation of the Red Cross charter. Courts must look to "the state of the law *at the time the legislation was enacted*," and not to susequently enacted laws, to interpret the meaning of statutory language. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 378 (1982) (emphasis added). When Congress reincorporated the Red Cross in 1905, the *Pacific Railroad* doctrine was still valid. Thus, the mere fact of federal incorporation conferred federal jurisdiction on cases involving the Red Cross.

After the passage of 28 U.S.C. § 1349 in 1925, however, it appeared that jurisdiction could no longer

---

[8] See *Califano* v. *Sanders*, 430 U.S. 99, 106 n.6 (1977). As noted above, however, the Fourth Circuit has held as recently as 1983 that even this language confers federal jurisdiction.

be predicated solely on federal incorporation. Congress thereafter amended the Red Cross charter to refer specifically to the federal courts in its sue-and-be-sued clause. This brought the Red Cross charter into line with the unbroken line of precedent holding such references to constitute an express grant of federal jurisdiction.

Accordingly, both the language of the statute, construed in light of law existing when it was passed, and the legislative history contradict the court of appeals' decision. This Court should grant the Red Cross's petition to resolve the conflict in the circuits and correct the First Circuit's error.

III. THE QUESTION PRESENTED IS IMPORTANT

Justice Scalia has observed that "[n]othing is more wasteful than litigation about where to litigate." *Bowen* v. *Massachusetts*, 487 U.S. at 930 (dissenting opinion); see also *Christianson* v. *Colt Industries Operating Corp.*, 486 U.S. 800, 818-819 (1988). With the lower federal courts hopelessly divided on whether the Red Cross may automatically remove cases from state to federal court, and the only two appellate courts to decide the issue in disagreement, no end to the widespread litigation of this issue is in sight unless this Court grants certiorari. Cases may continue to be erroneously remanded to state court, or (if our position turns out to be wrong) cases may proceed to trial in federal courts that have no jurisdiction; either way, the potential waste of resources is great. A decision by this Court would relieve the burden on the lower federal courts that must continue to grapple with this issue, and on the Red Cross.

The more than 40 decided AIDS-related cases that have addressed the jurisdictional issue are among the

many such cases that have been brought against the Red Cross. The court of appeals expressly cited the "importance of the jurisdictional issue" and the "increasing litigation" involving transfusion-associated AIDS as its reasons for granting the interlocutory appeal in this case. App., *infra*, 2a. Substantial resources have been and will continue to be devoted to this preliminary, procedural issue until it receives definitive resolution. Those resources necessarily are diverted not only from other important work of the courts, but also from other important work of the Red Cross itself.

Both Congress and this Court have recognized the importance of the services performed by the Red Cross. Congress reincorporated the Red Cross in 1905 to introduce direct federal supervision of and representation in the national organization because it "believed that the importance of the work" performed by the Red Cross demanded increased participation by the federal government. 36 U.S.C. § 1 note. This Court too has adverted to the "wide variety of functions indispensable to the workings of our Armed Forces around the globe, and * * * to the States in time of need" that the Red Cross fulfills. *Department of Employment*, 385 U.S. at 359 (footnotes omitted). The Red Cross's blood services program, directly at issue in the increasing litigation, plays a central role in the performance of these crucial services. Indeed, in a recent opinion resolving the same question presented here in the same general context of AIDS-related litigation resulting from a blood transfusion, Judge Ideman of the Central District of California traced the relationship of the blood program to the national purposes for which the Red Cross was chartered and concluded that "[t]hose purposes may be thwarted if local or regional needs or prejudices are allowed to

bring undue pressure on the Red Cross[,] * * * [which] could easily be brought to bear in trial situations in a local forum." *Reisner* v. *Regents of the University of California*, slip op. 4-6.

Resolution of the jurisdictional issue by this Court —and a decision favoring the federal forum—is also necessary in order to promote uniformity in the decision of certain federal questions that will arise repeatedly in AIDS-related tort suits as a result of the Red Cross's status as a federal instrumentality. Trial courts will need to decide, for example, whether the Red Cross shares the federal government's immunity from punitive damages[9] and from jury trial demands.[10] Whatever the correct resolution of those questions may be, they are *federal* questions that should receive *federal* determination. Cf. *International Primate Protection League* v. *Administrators of Tulane Educational Fund*, 111 S. Ct. 1700, 1709 (1991) (complex issues of federal immunity may "need[] the protection of a federal forum"). Yet those questions will be entrusted to the state courts roughly half the time—on a virtually random basis —unless this Court grants certiorari and reverses the decision of the court of appeals.

---

[9] See *Okoro* v. *Children's Hospital National Medical Center*, Civ. No. 5325-87, slip op. 7 (D.C. Super. Ct. May 30, 1989) ("A Federal instrumentality retains its immunity from punitive damages unless Congress explicitly authorizes liability for such damages. The statute creating the Red Cross did not provide such an explicit waiver.") (citation omitted).

[10] See *Lehman* v. *Nakshian*, 453 U.S. 156, 168 (1981); *In re Young*, 869 F.2d 158 (2d Cir. 1989) (United States Postal Service, as a federal instrumentality with a sue-and-be-sued clause, has immunity from jury trial demands); *Jones-Hailey* v. *TVA*, 660 F. Supp. 551 (E.D. Tenn. 1987) (same as to TVA).

Finally, review of the decision below is important because of the cloud it places over the jurisdictional provisions of statutes applicable to other federal agencies, officials, and instrumentalities. As already noted (p. 14, *supra*), the Solicitor General regards a sue-and-be-sued clause that refers to "any court of competent jurisdiction, State or Federal," as a grant of jurisdiction to the federal district courts. Other statutes, including those applicable to the Pension Benefit Guarantee Corporation, the Federal National Mortgage Association, and the Government National Mortgage Association, also contain that language or language sufficiently similar to be affected by the decision below (and do not contain language deeming all questions to arise under federal law).[11] Furthermore, Justice Jackson has cited 12 U.S.C. § 1432, applicable to Federal Home Loan Banks, as a jurisdiction-conferring statute indistinguishable from that of the FDIC. *D'Oench, Duhme*, 315 U.S. at 468 n.5 (concurring opinion). If the court below is right in demanding "mention [of] a particular federal court" (App., *infra*, 8a) to find jurisdiction, however, then the Solicitor General and Justice Jackson are wrong, and the previously assumed basis for federal jurisdiction over these entities is absent. This Court should

---

[11] 12 U.S.C. § 1723a(a) (GNMA and FNMA); 29 U.S.C. § 1302(b)(1) (PBGC). The statute applicable to GNMA and FNMA, like 12 U.S.C. § 1702 and the pre-1947 FCIC statute, grants the power to sue and be sued "in any court of competent jurisdiction, State or Federal." The "of competent jurisdiction" language *weakens* the case for construing the statute as a grant of original federal jurisdiction (see p. 22, *supra*), yet statutes containing that language have been so construed. If that construction is proper, it follows *a fortiori* that the Red Cross charter, which lacks such language, confers jurisdiction.

resolve the uncertainty created by those conflicting views.

In sum, the authorities are in substantial disarray on a matter of importance to the courts, to the Red Cross, and to other components of the government. This case presents a rare opportunity for this Court to address the disputed jurisdictional issue and to bring much-needed certainty and uniformity to this area. Therefore, the Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH S. GELLER
Counsel of Record
ROY T. ENGLERT, JR.
JAMES G. DUNCAN
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

BRUCE M. CHADWICK
BRENDAN COLLINS
Arnold & Porter
1200 New Hampshire Ave., N.W.
Washington, D.C. 20036

KAREN SHOOS LIPTON
General Counsel
EDWARD L. WOLF
Associate General Counsel
American National Red Cross
17th & D Streets, N.W.
Washington, D.C. 20006

Counsel for Petitioner

OCTOBER 1991

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1873

S. G. and A. E.,
PLAINTIFFS, APPELLANTS,

v.

AMERICAN NATIONAL RED CROSS,
DEFENDANT, APPELLEE.

Appeal from the United States District Court
for the District of New Hampshire

[Hon. Shane Devine, *U.S. District Judge*]

Before
Campbell, *Circuit Judge*,
Coffin, *Senior Circuit Judge*,
and Cyr, *Circuit Judge*.

Gilbert Upton with whom *Gary B. Richardson* and *Upton, Sanders & Smith* were on brief for appellants.

Edward L. Wolf, Associate General Counsel, American National Red Cross, with whom *Bruce M.*

Chadwick, Brendan Collins, Arnold & Porter, Irvin D. Gordon and *Sulloway, Hollis & Soden* were on brief for appellee.

July 24, 1991

CAMPBELL, *Circuit Judge.* This appeal presents the question of whether the language of the congressional charter of the American National Red Cross, 36 U.S.C. § 2, confers original federal jurisdiction over all suits involving the Red Cross. Answering this question affirmatively, the district court denied the plaintiffs' motion to remand the case to state court but certified the question for immediate appellate review pursuant to 28 U.S.C. § 1292(b). Because of the importance of the jurisdictional issue presented, especially in light of the increasing litigation concerning the transmission of the HIV virus through the transfusion of tainted blood, we granted the plaintiff's petition for permission to appeal.

For the reasons set forth below, we hold that Congress's amendment of the Red Cross charter in 1947, as reflected in 36 U.S.C. § 2,[1] did not create original federal jurisdiction over all suits involving the Red Cross. Therefore, should the district court determine that joinder of the nondiverse parties is appropriate under Fed. R. Civ. P. 20(a), the only

---

[1] 36 U.S.C. § 2 provides, in relevant part:

> [The American National Red Cross] shall have . . . the power to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States. . . .

remaining basis for federal jurisdiction—diversity of citizenship—will be destroyed, requiring remand to the state court.

I.

In April 1984, S.G., a resident of Concord, New Hampshire, entered Concord Hospital to undergo a hysterectomy. During the course of the surgery, a blood transfusion was administered. The plaintiffs, S.G. and her husband, allege that a combination of the negligence of the surgeon, the late Dr. Kenneth L. McKinney, in performing the surgery and the malfunction of a surgical stapler manufactured by Auto Suture Company necessitated the blood transfusion. S.G. was transfused with blood supplied by the American Red Cross Blood Services, Vermont-New Hampshire Region, a division of the American National Red Cross. The blood was allegedly contaminated with human immunodeficiency virus (HIV), and S.G. subsequently contracted AIDS.

In April 1988, the plaintiffs filed suit in the Superior Court of Merrimack County against the estate of Dr. McKinney. In August 1988, they filed suit in the same court against Auto Suture Company. Almost two years later, in March 1990, they filed the instant action in the same court against the Red Cross, simultaneously moving to consolidate this action with the other related actions pending in state court. Before the state court ruled on the motion to consolidate, the Red Cross removed the suit to the United States District Court for the District of New Hampshire pursuant to 28 U.S.C. § 1441, alleging original jurisdiction under 36 U.S.C. § 2 (the Red Cross charter), as well as diversity jurisdiction under 28 U.S.C. § 1332.

The plaintiffs subsequently filed a "Motion to Join Parties, Remand and for Other Relief," requesting that the district court remand the case to state court or, alternatively, order that the state court defendants be joined in the action in federal court. The district court denied the plaintiffs' motion to remand, finding that the suit against the Red Cross fell within the exclusive jurisdiction of the federal court. However, pursuant to the plaintiffs' petition for leave to appeal, the district court modified its order so as to certify the matter for appeal pursuant to 28 U.S.C. § 1292(b). This court accepted certification of the interlocutory appeal on September 13, 1990.

II.

Assuming that the proper joinder of all other defendants in the federal court would destroy complete diversity, the jurisdiction of the federal district court would depend upon whether that court has *original* subject matter jurisdiction over cases involving the Red Cross.[2] That issue depends in turn upon whether a grant of original jurisdiction can be inferred from the language of the amended federal charter of the Red Cross. *See* 36 U.S.C. § 2.

A number of federal district courts have decided the jurisdictional question presented here. About half of these courts have held that the existing "sue and be sued" language in the Red Cross charter con-

---

[2] In their brief on appeal, the appellants argue that, even if 36 U.S.C. § 2 confers original federal jurisdiction, the case should be remanded to state court either because the basis for jurisdiction does not appear on the face of a well-pleaded complaint or because principles of abstention require remand. Because we hold that the Red Cross charter did not confer original federal jurisdiction, we need not address these arguments.

fers original federal subject matter jurisdiction, while the remainder have held not.[3] Because a district court's decision to remand a case is not appealable, review by the court of appeals is available only through petition pursuant to 28 U.S.C. § 1292(b). Consequently, only one circuit court has addressed the issue presented here. In *Kaiser* v. *Memorial Blood Center*, No. 89-5533 (8th Cir. April 10, 1991), the Eighth Circuit held that the "sue and be sued" language in the charter conferred original federal jurisdiction over the Red Cross. For the reasons set forth below, we reach a different conclusion.

A. *Case Law and the Interpretation of "sue and be sued" Clauses*

Courts that have held that original jurisdiction exists, including the Eighth Circuit, have relied primarily on *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). In *Osborn*, the Supreme Court sustained the authority of an Ohio federal circuit court to entertain a suit brought by the Second Bank of the United States to enjoin the collection of a state tax levied against the bank. Chief Justice Marshall, writing for the Court, located the specific conferral of original federal jurisdiction over the bank's suit in the language of the bank's charter which empowered it "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all state courts having competent

---

[3] *Compare Rivera Gonzalez* v. *Commonwealth of Puerto Rico*, 726 F. Supp. 10 (D.P.R. 1989); *Anonymous Blood Recipient* v. *Sinai Hospital*, 692 F. Supp. 730 (E.D. Mich. 1988) *with Collins* v. *American Red Cross*, 724 F. Supp. 353 (E.D. Pa. 1989); *Roche* v. *American Red Cross*, 680 F. Supp. 449 (D. Mass. 1988).

jurisdiction, and in any circuit court of the United States." Because this language—unlike the "sue and be sued" language in the charter of the First Bank of the United States—expressly referred to the federal courts, the Court concluded that the charter provision conferred jurisdiction upon the circuit court. *Osborn*, 22 U.S. at 817. Having determined that the charter conferred jurisdiction, the Court went on to conclude that any case involving the congressionally-chartered Bank was, necessarily, a federal question case and therefore within the Article III "arising under" jurisdiction. In other words, *Osborn* held not only that the charter conferred jurisdiction but that, under the Constitution, Congress had the power to confer such jurisdiction over cases involving the bank.

Marshall's rationale for concluding that suits involving the bank "arise under" federal law—that the bank's power to "sue and be sued" was created by federal law—led to a great expansion of cases in the federal courts following the enactment of the Judiciary Act of 1875, which established general federal question jurisdiction. *See Pacific Railroad Removal Cases*, 115 U.S. 1 (1885); Mishkin, "The Federal 'Question' in the District Courts," 53 *Colum. L. Rev.* 157, 160 n.24 (1953). To shield federal courts from the burden of federal incorporation cases that were of no substantive federal consequence, Congress, in 1925, enacted the predecessor of what is now 28 U.S.C. § 1349: "The district court shall not have jurisdiction of any civil action by or against any corporation upon the ground that it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock." Thus, to the extent *Osborn* suggested

that all suits involving a federally-chartered corporation presented a federal question, 28 U.S.C. § 1349 overruled that aspect of *Osborn*.

The significance of *Osborn*, then, to the Red Cross charter cases, is limited to its focus upon the "sue and be sued" language of the particular charter. In holding that the language of the charter conferred original federal jurisdiction, the *Osborn* Court distinguished *Bank of the United States* v. *Deveaux*, 9 U.S. (5 Cranch.) 61 (1809). In *Deveaux*, the Court interpreted the national bank's previous charter, which empowered the bank to "sue and be sued . . . in courts of record, or any other place whatsoever," as having established only the bank's capacity to litigate. *Osborn*, 22 U.S. at 817. Marshall explained that the *Deveaux* decision "amount[ed] only to a declaration that a general capacity in the bank to sue, without mentioning the courts of this Union, may not give a right to sue in those courts." *Osborn*, 22 U.S. at 818. This raises the question whether the grant of power to "sue and be sued" expressly in a federal court, as well as in a state court, leads by itself to any different result. We think not. We do not believe that *Osborn*'s holding that the second charter created jurisdiction should be read to confer talismanic significance on a simple reference to federal courts in a congressional charter. On the contrary, *Osborn* must be read in light of subsequent case law and legislation that has both expanded and limited federal jurisdiction in the 166 years since the case was decided.

The Supreme Court revisited the issue of "sue and be sued" clauses in *Banker's Trust Co.* v. *Texas and Pacific Railway Co.*, 241 U.S. 295 (1916). *In Bank-*

er's Trust, the Court was faced, as we are here, with a "sue and be sued" clause, the specificity of which fell somewhere between *Osborn* and *Deveaux*. Texas & Pacific Railway's charter enabled it to "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all courts of law and equity within the United States." 241 U.S. at 301. The charter made explicit reference to all courts within the United States but, unlike *Osborn*, did not mention a particular federal court (i.e., the circuit court). In *Banker's Trust*, the Supreme Court held that this charter did not expand the jurisdiction of federal courts, explaining that "[h]ad there been a purpose to take suits by and against the corporation out of the usual jurisdictional restrictions relating to the nature of the suit, the amount in controversy and the venue, it seems reasonable to believe that Congress would have expressed that purpose in altogether different words." 241 U.S. at 303.

The Supreme Court's requirement, in *Banker's Trust*, of clearer language regarding the conferral of federal jurisdiction rested, at least in part, on the 1915 amendment to the Judiciary Act which provided that "no court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that said railroad company was incorporated under an act of Congress." Act of Jan. 28, 1915, ch. 22, § 5, 38 Stat. 803. The Court's interpretation of the railroad's charter in light of this amendment is significant to our reading of the Red Cross charter since, as noted, Congress enacted a similar amendment in 1925, 18 U.S.C. § 1349, which applied to *all* federally-chartered corporations. While § 1349 does not preclude an express grant of federal jurisdiction over such a corporation,

Banker's Trust strongly suggests that a congressional grant of such jurisdiction should not be implied from ambiguous language. *See* 241 U.S. at 303.

The "sue and be sued" clause of the Red Cross Charter differs, moreover, in significant ways from the "sue and be sued" clause found to confer federal jurisdiction in *Osborn*. The charter in *Osborn* gave the bank the power to "sue and be sued . . . in all state courts *having competent jurisdiction*, and in any circuit court in the United States" 22 U.S. at 817 (emphasis supplied). Thus, the language of the bank charter in *Osborn* expressly indicated the Congress was concerned with the jurisdiction of the courts in which the bank could "sue and be sued." Certain state courts would have jurisdiction over the bank, and, in those courts, Congress conferred on the bank the power to "sue and be sued." As to federal courts, Congress excluded the jurisdictional caveat, simultaneously conferring the power to sue and expanding federal jurisdiction to include such suits. Such a conferral was important because, at the time the bank was chartered, the district and circuit courts were not vested with any general federal question jurisdiction. Absent some statutory provision linking federal jurisdiction to a particular litigant or set of issues, federal questions usually did not get into the federal courts except on writs of error to the Supreme Court from the highest courts of the states, *see, e.g., McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), or in the context of a suit between citizens of different states. Thus, at that time, a conferral of the power to sue in a federal court, without some corresponding grant of original federal jurisdiction, would have had relatively narrow application.

The Red Cross charter, like the charters at issue in *Deveaux* and *Banker's Trust*,[4] makes no reference to the jurisdiction of specific courts, either state or federal. Rather, it confers on the Red Cross the power "to sue or be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States." This language cannot be deemed to have expanded the jurisdiction of *state* courts over the Red Cross—the Red Cross has no power to "sue or be sued" in a state court, absent some independent basis for the court's jurisdiction. And, unlike the *Osborn* charter, § 2 treats state and federal courts in a parallel fashion. No clear basis exists for interpreting § 2 as having expanded the jurisdiction of federal courts over the Red Cross while merely having conferred on the organization the power to sue in state courts, assuming that some independent jurisdictional ground exists in state court. This is particularly true given the availability of general federal question jurisdiction, an independent basis for original federal jurisdiction which did not exist at the time of *Osborn*.

The Red Cross argues that the more recent case of *D'Oench, Duhme & Co.* v. *Federal Deposit Insurance Corp.*, 315 U.S. 447 (1942), stands for the proposition that a charter empowering a corporation to "sue and be sued in state or federal court" establishes original federal jurisdiction over cases involving the corporation. However, in *D'Oench* the Supreme Court did not interpret the meaning of the "sue and be

---

[4] The bank's charter in *Deveaux* empowered the bank "to sue and be sued . . . in courts of record, or any other place whatsoever." In *Banker's Trust*, the railroad could "sue and be sued in all courts of law and equity within the United States."

sued" clause. Rather, the Court addressed the question of whether, in a nondiversity case, a federal court should apply state law or federal common law in the absence of a governing federal statute, noting only incidentally that jurisdiction was premised on the "sue and be sued" clause. 315 U.S. at 455. Neither the parties nor the Court directly raised the validity of subject matter jurisdiction under the F.D.I.C. charter. Even more to the point, the F.D.I.C. charter in *D'Oench*—unlike the Red Cross charter—expressly provides that "all suits of a civil nature at common law or equity to which the Corporation shall be a party *shall be deemed to arise under* the law of the United States."[5] 12 U.S.C. § 264(j) (emphasis supplied).

---

[5] The language and legislative history of the F.D.I.C. charter actually support the narrower, nonjurisdictional reading of the Red Cross charter. The original F.D.I.C. enabling legislation of June 16, 1933 provided, in language virtually identical to the Red Cross charter, that the F.D.I.C. would have the power "to sue and be sued, complain and defend, in any court of law or equity, State or Federal." Banking Act of 1933, ch. 89, § 8, 48 Stat. 168 (June 16, 1933). On August 23, 1935, the provision was amended to include the language "shall be deemed to arise under the laws of the United States." Banking Act of 1935, ch. 614, § 101, 49 Stat. 684. The Report of the Senate Committee on Banking and Currency makes clear that the purpose of this amendment was to confer original federal jurisdiction in F.D.I.C. cases. *See* S. Rep. No. 1007, 74th Cong., 1st Sess. 5. No comparable language can be found in the Red Cross charter.

It is also interesting to note that *D'Oench* is the only case in the 166 years since *Osborn* that the Supreme Court has even arguably held that a "sue and be sued" clause creates federal jurisdiction.

B. *Legislative History of the Amendment*

Our reading of the "sue and be sued" clause in the Red Cross charter as conferring only the power to sue is supported by the structure of the charter itself and the legislative history of the amendment. Sections one through thirteen of title 36 concern the creation and operating procedures of the Red Cross. Within the framework of the statute, section 2, entitled "Name of corporation; powers," denominates standard corporate powers. For example, the section names the Red Cross and provides for perpetual succession; it confers the right to use a seal and emblem, the power to establish bylaws, and the right to own property. The interpretation of the "sue and be sued" clause as limited to the power of the Red Cross to litigate is consistent with the apparent purpose and context of the clause.

The legislative history of the amendment is relatively sparse and evinces no clear intent on the part of Congress to confer original jurisdiction. When Congress amended the Red Cross charter in 1947, it adopted many of the recommendations of the recently formed Red Cross Advisory Committee. The committee, known as the Harriman Committee, was formed to recommend changes in the Red Cross charter to make the governing board more representative and to ensure the most effective handling of its programs. *The American National Red Cross Report of The Advisory Committee on Organization*, at 3, 15 (June 11, 1946) (hereinafter *Report*). In the last section of its report, entitled "Miscellaneous Recommendations," the committee recommended that the charter clarify the status of the Red Cross as a litigant in federal court:

> *Recommendation No. 22. The Charter should make it clear that the Red Cross can sue and be sued in the Federal Courts.* The present Charter gives the Red Cross the power to "sue and be sued in courts of law and equity within the jurisdiction of the United States." The Red Cross has in several instances sued in the Federal Courts, and its powers in this respect have not been questioned. However, in view of the limited nature of the jurisdiction of the Federal Courts it seems desirable that this right be clearly stated in the Charter.

Report at 35-36.

This recommendation led Congress to amend the charter by inserting the phrase "State or Federal" following the existing language "sue and be sued in the courts of law and equity" in the Red Cross charter. Even assuming that Congress acted in direct response to the committee's recommendation, the insertion of this language is insufficient to support the expansive view of federal jurisdiction urged by the Red Cross in this case. The Harriman Committee report itself does not clearly indicate that the proposed amendment was aimed at conferring federal subject matter jurisdiction as opposed to clarifying capacity to litigate in the federal courts when jurisdiction otherwise existed. Explaining the recommendation, the report initially refers simply to the Red Cross's *power* to sue in federal court. Although the report subsequently refers to the jurisdiction of federal courts and the "right" of the Red Cross in this regard, the language of the recommendation itself makes no such reference to jurisdiction. The goal of the recommendation seems to have been to confirm the Red Cross's capacity to litigate in federal court; indeed, the report expressly

noted that the organization had done so in the past based on ordinary jurisdictional grounds. *Id.; see, e.g., Lovskog* v. *American National Red Cross*, 111 F.2d 88 (9th Cir. 1940); *American Red Cross* v. *Raven Honey Dew Mills*, 74 F.2d 160 (8th Cir. 1934). As the Committee recommended, the revised charter does make clear that the Red Cross "*can* sue and be sued in federal court." However, the language of the amendment does not purport to expand the jurisdiction of federal courts to include all cases involving the Red Cross. Moreover, the Senate Report makes no mention of the jurisdictional point whatsoever. S. Rep. No. 38, 80th Cong., 1st Sess., *reprinted in* 1947 *U.S. Code Cong. Serv.* 1028.

Had Congress intended to expand jurisdiction, it could easily have adopted the clear and specific language used to create federal jurisdiction common in other charters amended at approximately the same time. For example, eleven weeks after amending the Red Cross charter, the same Congress passed legislation amending the charter of the Federal Crop Insurance Corporation. The F.C.I.C.'s amended charter provided that it "may sue and be sued in its corporate name in any court of record of a State having general jurisdiction, or in any United States district court, *and jurisdiction is hereby conferred upon such district court to determine controversies without regard to the amount in controversy.*" Act of August 1, 1947, ch. 440, § 7, 61 Stat. 719 (current version at 7 U.S.C. § 1506) (emphasis supplied). Congress so amended the F.C.I.C. charter despite the presence of the language "sue and be sued in any court, state or federal" in the corporation's original charter.

Similarly, in creating the Commodity Credit Corporation in 1948, Congress provided that "the district

courts of the United States . . . shall have exclusive original jurisdiction, without regard to the amount in controversy, of all suits brought by or against the Corporation." Act of June 29, 1948, ch. 704, § 4, 62 Stat. 1070; *see also* note 4, *supra*, (noting the inclusion of "deemed to arise under" language in the F.D.I.C. charter amended in 1935.) Thus, at the very time it amended the Red Cross charter, Congress could be quite specific in expressing grants of federal jurisdiction. In such circumstances, we are unable to interpret the 1947 amendment confirming the Red Cross's capacity to litigate as intended simultaneously to expand the subject matter jurisdiction of federal courts to encompass all suits by and against that organization.

Finally, we note that *Patterson* v. *American National Red Cross*, 101 F. Supp. 655 (M.D. Fla. 1951), a case decided just four years after the charter amendment, suggests that even the Red Cross itself did not view the 1947 amendment as having created a new basis for federal jurisdiction. In that case, the Red Cross opposed the plaintiff's motion to remand a case that the Red Cross had removed to federal court based on diversity jurisdiction. The *Patterson* court cited the 1947 amendment merely as proof that Congress envisioned the prospect of federal litigation in which the Red Cross was a party. The Red Cross did not even suggest that the amendment conferred federal jurisdiction but viewed it, as did the court, merely as confirming the right of the organization to invoke diversity jurisdiction.

This is not to say that the question whether Congress intended to convert all Red Cross cases into federal question cases when it amended the Red Cross charter is easily decided. As a matter of practical

sense, it is easy to imagine that Congress would have conferred federal subject matter jurisdiction in cases by and against the Red Cross had the issue been presented. The division among the district courts and our sister circuit's conclusion differing from the one we reach today tempt us to reach out for a reading of the statute which, while unsupported in the text and legislative history, may seem more in tune with the times.[6] But we are not legislators. Our responsibility as a court is to interpret the law as written. If the statute was ineptly drafted—as may have been the case—or if modern demands now require conferring federal jurisdiction over Red Cross cases, the Congress has plenary power to act. We hold simply that neither the express language nor the history of the 1947 amendment of § 2 establishes that Congress intended to grant the Red Cross access to federal courts for the disposition of cases governed by state law absent some independent basis for federal jurisdiction.

Reversed and remanded. Costs to appellant.

---

[6] We note, however, that a grant of original federal jurisdiction over cases involving the Red Cross would not lead to increased uniformity in the determination of that organization's liability in the HIV cases. The tort law of the forum state would provide the rule of decision for the case, whether it is brought in state or federal court. *See* 28 U.S.C. § 1652 ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."); *see also*, Friendly, "In Praise of Erie—And of the New Federal Common Law," 39 *N.Y.U.L. Rev.* 383, 421-22 (1964) (noting that "*Erie* applies, whatever the basis of jurisdiction, to any issue in the case which is governed by state law operating of its own force").

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 90-1873

S.G. and A.E.,
PLAINTIFFS, APPELLANTS,

v.

AMERICAN NATIONAL RED CROSS,
DEFENDANT, APPELLEE.

JUDGMENT: Entered: July 24, 1991

This cause came on to be heard on appeal from the United States District Court for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows:

> The order of the district court is reversed and the cause is remanded to the district court in accordance with the opinion issued this date.
> Costs to appellants.

By the Court:

FRANCIS P. SCIGLIANO
Clerk

[cc: Messrs. Upton and Wolf]

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Civil No. 90-145-D

SUSAN GLADSTONE; ARTHUR ELLISON

v.

AMERICAN NATIONAL RED CROSS (sued herein under the name "AMERICAN RED CROSS BLOOD SERVICES, VERMONT-NEW HAMPSHIRE REGION, a Division of American Red Cross)

ORDER

This Order addresses the issues raised by plaintiffs' motion seeking joinder of parties and remand (document no. 5). Defendant objects to such motion (document no. 8).[1]

---

[1] On May 22, 1990, while the Court was engaged in completion of its Order, plaintiff filed a motion to permit the filing of a supplemental memorandum of law. The thrust of this motion was that defendant had failed to advise the Court that, as indicated in this Order, there was a division of judicial opinion with respect to the issue of federal jurisdiction concerning legal actions to which the American National Red Cross ("Red Cross") was a party. As the Court was already aware of and had reviewed such decisions, it finds the supplemental memorandum will not be helpful to it, and therefore denies the motion for filing of such memorandum.

1. Background

In April 1984, plaintiff Susan Gladstone, a resident of Concord, New Hampshire, underwent surgery at Concord Hospital. The surgeon was the late Kenneth L. McKinney, Jr., M.D.

In the course of the surgery, a blood transfusion was ordered and administered. Allegedly, the transfusion involved blood contaminated with the virus believed to be causal of AIDS, and plaintiff contends that she contracted such disease as a result of this transfusion.

In April 1988, plaintiffs [2] brought suit in the Superior Court of Merrimack County against the Estate of Dr. McKinney.[3] In August 1988, plaintiffs brought suit in the same court against Auto Suture Company.[4] The instant action was commenced in the same court in March 1990, naming Red Cross [5] as a defendant. Plaintiffs simultaneously moved to consolidate the instant action with the prior pending actions in the state court. Red Cross timely filed its notice of re-

---

[2] Plaintiff Arthur Ellison is the spouse of plaintiff Susan Gladstone.

[3] The gist of the action against the Estate of Dr. McKinney is that he negligently performed surgery in such fashion that a transfusion was required.

[4] The gist of the action against Auto Suture Company is that it manufactured the surgical stapler used by Dr. McKinney in the course of the operation and that such stapler was defective and, in turn, causative of the need for the transfusion.

[5] The actual named defendant is American Red Cross Blood Services, Vermont-New Hampshire Region, a Division of American Red Cross. For ease of reference, the term "Red Cross" will be applied with respect to the defendant.

moval of the instant action to this court. The instant motion invokes the provisions of Rule 20(a), Fed. R. Civ. P.,[6] and 28 United States Code 1441[7] and 1447(e).[8]

---

[6] Rule 20(a), Fed. R. Civ. P., provides in relevant part:

> All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

[7] 28 U.S.C. § 1441(b) provides:

> Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

[8] 28 U.S.C. § 1447(e) provides:

> If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

This section of the statute was added as of November 19, 1988, as part of the Judicial Improvements and Access to Justice Act, P.L. 100-702 ("the Act"). Designed, at least in part, to reduce the volume of diversity cases in federal courts, *Greer* v. *Skilcraft*, 704 F. Supp. 1570, 1575 (W.D. Ala. 1989), this section of the Act, codified at 28 U.S.C. § 1447(e) is to be more liberally construed than is the case where joinder is sought pursuant to the provisions of Rule 19, Fed. R. Civ. P. *Id.*, 704 F. Supp. at 1577; *Righetti* v. *Shell Oil Co.*, 711 F. Supp. 531, 533-35 (N.D. Cal. 1989); *Heininger* v. *Welcare Distributors, Inc.*, 706 F. Supp. 860, 861-62 (S.D. Fla. 1989).

The response of Red Cross is twofold: (1) the instant action has been properly removed to this court; and (2) in any event, actions against Red Cross must be lodged in a federal court.

2. Discussion

a. The Allowance of Joinder

Unless the only motive for seeking joinder is the destruction of diversity jurisdiction, the majority view is that joinder is addressed to the discretion of the court. *Walker* v. *Union Carbide Corp.*, 630 F. Supp. 275, 277 (D. Me. 1986) (and cases therein cited); *Adorno Enterprises* v. *Federated Department Stores*, 629 F. Supp. 1565, 1572-73 (D.R.I. 1986); *Shaw* v. *Munford*, 526 F. Supp. 1209, 1214 (S.D.N.Y. 1981).

Red Cross argues that it would be fundamentally unfair to permit joinder and remand at this stage of the proceedings. It says that much discovery has been had in its absence, with resultant prejudice to its defenses, and it points out perceived evidentiary problems were the cases to be tried in one forum.

It is well established that the addition of a non-diverse defendant [9] destroys diversity jurisdiction in a federal court. *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 374 (1978). Accordingly, a district court, in balancing the defendant's interests in maintaining a federal forum against the competing interests of abrogation of parallel lawsuits, must consider a number of factors. *Hensgens* v. *Deere &*

---

[9] The Estate of Dr. McKinney is resident in New Hampshire, and thus no diversity exists between it and the plaintiffs.

Co., 833 F.2d 1179, 1182 (5th Cir. 1987), *cert. denied*, 110 S. Ct. 150 (1989). These include the extent to which the purpose of the proposed joinder is to defeat federal jurisdiction, whether plaintiffs have been dilatory in asking for joinder, whether plaintiffs will be significantly injured if joinder is not allowed, and any other factors bearing on the equities. *Id.* The closeness of the relationship between the new and old parties to the litigation, the effect of joinder on the court's jurisdiction, and the liberality with which Rule 20(a), Fed. R. Civ. P., is to be construed, are additional factors to weigh in such balance. *Desert Empire Bank* v. *Insurance Co. of North America*, 623 F.2d 1371, 1375-76 (9th Cir. 1980).

Thus considered, the call here is a close one. Plaintiffs have been dilatory in seeking to press claims against Red Cross, and the discovery which took place in the interim will make it more difficult for Red Cross to mount its defenses. On the other hand, the avoidance of waste of scant judicial resources involved in parallel proceedings militates against the maintenance of separate trials in state and federal courts, and, although difficult, the completion of discovery is not here impossible.[10] Moreover, a competent trial judge should have no unusual difficulty in resolving the perceived evidentiary problems raised by Red Cross.

On balance, therefore, absent jurisdictional matters hereinafter discussed, the Court would be inclined to

---

[10] The Court notes that the motion for consolidation filed in state court concedes the plaintiffs' willingness to allow Red Cross to complete such discovery as is necessary to properly prepare its defenses.

permit joinder and order a remand of this action to the state court.

b. The Jurisdictional Problem

In pertinent part, 36 U.S.C. § 2 provides:

> The name of this corporation shall be "The American National Red Cross", and by that name it shall have perpetual succession, with the *power to sue and be sued in courts of law and equity, State or Federal, within the jurisdiction of the United States. . . .*

(Emphasis added.)

Red Cross argues that the "sue-and-be-sued" clause above emphasized operates to create exclusive federal jurisdiction over legal actions to which Red Cross is a party.

As with the issue previously discussed concerning joinder, the courts are divided on this argument. Illustrative (although not all inclusive) in supporting the position of Red Cross are the decisions in *Rivera Gonzalez* v. *Commonwealth of Puerto Rico*, 726 F. Supp. 10 (D.P.R. 1989); *Kaiser* v. *Memorial Blood Center of Minneapolis, Inc.*, 724 F. Supp. 1255 (D. Minn. 1989); *Anonymous Blood Recipient* v. *Sinai Hosp.*, 692 F. Supp. 730 (E.D. Mich. 1988); *C.H.* v. *American Red Cross*, 684 F. Supp. 1018 (M.D. Mo. 1987). Contrary decisions are to be found in *Collins* v. *American Red Cross*, 724 F. Supp. 353 (E.D. Pa. 1989); *Anonymous Blood Recipient* v. *William Beaumont Hosp.*, 721 F. Supp. 139 (E.D. Mich. 1989); *Walton* v. *Howard Univ.*, 683 F. Supp. 826 (D.D.C. 1987); *Roche* v. *American Red Cross*, 680 F. Supp. 449 (D. Mass. 1988); *Griffith* v. *American Red Cross*, 678 F. Supp. 182 (S.D. Ohio 1984).

The foundation of this judicial division appears to be the ruling of the Supreme Court in *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat) 738 (1824). In the *Osborn* case, the State of Ohio, seeking to enforce a statute imposing a tax on the Bank of the United States, seized funds of the bank. The bank obtained an injunction in federal court prohibiting the state from enforcing the tax and requiring return of the seized funds. In upholding the injunction, the Supreme Court looked to a clause in the bank's charter allowing it to "sue and be sued . . . in all State Courts having competent jurisdiction, and in any Circuit Court of the United States," holding that such clause was a comprehensive grant of federal jurisdiction in all cases to which the bank was a party.

The *Osborn* decision has been the subject of criticism and questioning, *see, e.g., Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 492-93 (1983); *Anonymous Blood Recipient* v. *William Beaumont Hosp., supra*, 721 F. Supp. at 142-44, but it has never been overruled. Accordingly, with due respect for the scholarly approach of the distinguished jurists who have sought to distinguish it in the context of jurisdiction pursuant to 36 U.S.C. § 2, this Court finds the better-reasoned rule to be that requiring a finding, here made, that legal actions to which the Red Cross is a party fall within the exclusive jurisdiction of federal courts. It follows that joinder or remand of the instant action to a state court is not permitted.[11]

---

[11] Nor is this case one in which the expansion of removal jurisdiction (discussed in *Charles D. Bonanno Linen Service, Inc.* v. *McCarthy*, 708 F.2d 1, 10 (1st Cir.), *cert. denied*, 464

3. Conclusion

Although federal courts regularly decide questions of state law pursuant to diversity jurisdiction, it has to be borne in mind that, in fact, unlike their state counterparts, federal courts are possessed of limited, rather than general, jurisdiction. For the reasons hereinabove detailed, the Court, albeit reluctantly, finds and rules that it must and according herewith does deny plaintiffs' motion seeking joinder and remand of the instant action to the state court.

SO ORDERED.

/s/ Shane Devine
Chief Judge
United States District Court

May 24, 1990

cc: Gary B. Richardson, Esq.
Irvin D. Gordon, Esq.
Bruce M. Chadwick, Esq.

U.S. 936 (1983), and *Thomas* v. *Shelton*, 740 F.2d 478, 482-83 (7th Cir. 1984)), with its attendant constitutional questions comes into play.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Civil No. 89-145-D

SUSAN GLADSTONE; ARTHUR ELLISON

v.

AMERICAN NATIONAL RED CROSS (sued herein under the name "AMERICAN RED CROSS BLOOD SERVICES, VERMONT-NEW HAMPSHIRE REGION, a Division of American Red Cross)

ORDER

Plaintiffs have moved (document no. 11) the Court to modify its Order of May 24, 1990 (document no. 10) in such fashion as to permit certification of an interlocutory appeal pursuant to 28 U.S.C. § 1292 (b). The defendant Red Cross objects (document no. 12).

1. Background

The Court's Order considered plaintiff's motion to join additional parties defendant and to remand the joined action to state court.[1] Upon analysis of the factors required in consideration of 28 U.S.C. § 1447

---

[1] As the parties sought to be joined were New Hampshire residents, as are plaintiffs, their joinder would destroy diversity and require remand. *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 374 (1978).

(e) and Rule 20, Fed. R. Civ. P., the Court ruled that "absent jurisdictional matters hereinafter discussed [it] would be inclined to permit joinder and order a remand of this action to the state court." Document no. 10, at 6.

The jurisdictional matters referred to concerned the issue as to whether 36 U.S.C. § 2 vested original jurisdiction over Red Cross in federal courts. On review of the conflicting authorities interpreting that statute, the Court ruled that such jurisdiction was vested in the federal court, and therefore plaintiff's motion must be denied.

2. Discussion

In pertinent part, 28 U.S.C. § 1292(b) provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The court of appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken in such order, if application is made to it within ten days after the entry of the order.

In the First Circuit, it is clearly established that only rare cases will qualify for the relief of certification afforded by 28 U.S.C. § 1292(b). *Lane* v. *First Nat'l Bank of Boston*, 871 F.2d 166, 167 n.2 (1st Cir. 1989); *In re San Juan Dupont Plaza Hotel Fire Litigation*, 859 F.2d 1007, 1010 n.1 (1st Cir. 1988);

Palandjian v. *Pahlavi*, 782 F.2d 313, 314 (1st Cir. 1986), *cert. denied*, 481 U.S. 1037 (1987); *McGillicuddy* v. *Clements*, 746 F.2d 76, 76 n.1 (1st Cir. 1984).

Plaintiffs point to the conflicting decisions on the issue of jurisdiction over Red Cross. Such decisions exist in the First Circuit, *compare Rivera Gonzalez* v. *Commonwealth of Puerto Rico*, 726 F. Supp. 10 (D. P.R. 1989), *with Roche* v. *American Red Cross*, 680 F. Supp. 449 (D. Mass. 1988), and elsewhere, *see* Document 10, at 7. Such conflict, the Court concludes, qualifies the issue for certification under the First Circuit requirements.

Defendant argues, however, that as diversity jurisdiction contines to exist, resolution of the issue of jurisdiction over Red Cross pursuant to 36 U.S.C. § 2 would not materially advance the ultimate determination of the litigation. Because the Court did not wisely choose the language in its prior Order, this argument, as the Order now stands, has some merit.

Accordingly, the Court herewith modifies its Order of May 24, 1990, by striking therefrom the last paragraph before the heading "b. The Jurisdictional Problem" on page 6, and inserting in its place and stead the following paragraph.

> On balance, therefore, although there is diversity jurisdiction as between plaintiffs and Red Cross, proper consideration of the factors required in application of 28 U.S.C. § 1447(e) and Rule 20, Fed. R. Civ. P., require that plaintiff's motion for joinder and remand be granted. Unfortunately, however, an order to this effect may not now be entered because of additional jurisdictional matters which are hereinafter discussed.

The Court further modifies its Order of May 24, 1990, by adding (under the heading "Conclusion") on page 9 the following paragraph.

> The conflicting decisions of the districts both within and without the First Circuit make the instant case one of those "rare cases" which cry out for certification to the Court of Appeals of the First Circuit pursuant to the provisions of 28 U.S.C. § 1292(b). Specifically, the issue of jurisdiction over Red Cross pursuant to 36 U.S.C. § 2 presents a "controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal from [this court's] order may materially advance the ultimate termination of the litigation."[2] The Court therefore respectfully requests the Court of Appeals to accept certification of an interlocutory appeal pursuant to 28 U.S.C. § 1292 (b).

In all other respects, the Order of May 24, 1990, is herewith affirmed. Pending resolution of whether the Court of Appeals will accept certification of the interlocutory appeal, further proceedings in the instant litigation are stayed. If certification is accepted, this stay is to be continued until final resolution of the interlocutory appeal. Counsel for plaintiffs is directed to advise the Court in writing at intervals of ninety (90) days as to the status of this litigation.

---

[2] With respect to the issues of joinder and remand, this case is similar on its facts to those before the Court in *Wilson* v. *Famatex GmbH*, 726 F. Supp. 950 (S.D.N.Y. 1989).

SO ORDERED.

/s/ Shane Devine
Chief Judge
United States District Court

June 19, 1990

cc: Gary B. Richardson, Esq.
Irvin D. Gordon, Esq.
Bruce M. Chadwick, Esq.